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Supreme Court, U.S.
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No. 95-2015

IN THE
Supreme Court of the United States
October Term, 1995

KENNETH W. McGILL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. **In the face of conflicting circuit courts, it is unclear whether a convicted felon may have the district court review and render a decision as to whether his firearms disabilities should be removed since the Bureau of Alcohol, Tobacco and Firearms is no longer able to process a convicted felon's application for removal of Federal firearms disabilities.**

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
LIST OF AUTHORITIES.....	iii
CITATION TO OPINION BELOW.....	1
STATEMENT OF JURISDICTION.....	1
ARGUMENT AGAINST RESPONDENT'S OPPOSITION.....	2
CONCLUSION.....	6
PRAYER.....	6

LIST OF AUTHORITIES

Cases	Page(s)
Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1094 (5th Cir. 1989).....	2-5
Hessbrook v. Lennon, 777 F.2d 999, 1003 (5th Cir. 1986).....	2, 4
Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).....	3-5
Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990).....	3
Manecke v. School Board of Pinilias County, 762 F.2d 912, 918 (11th Cir. 1985), cert. denied, 404 U.S. 1062,106 S.Ct. 809, 88 L.Ed. 2d 784 (1986).....	3
Moyer v. ATF, 830 F.Supp. 516, 518 (W.D. Mo. 1993)..	2
Rice v. United States Department of Alcohol, Tobacco and Firearms, 68 F.3d 702 (3d Cir. 1995).....	5-6

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CITATION TO OPINION BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit is reported at 74 F.3d 64 (5th Cir. 1996)

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 because appellant seeks review of an adverse decision rendered by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AGAINST RESPONDENT'S OPPOSITION

Respondent's arguments in its Brief For The United States in Opposition (hereinafter referred to as "Respondent's Brief") is unpersuasive. Instead of arguing against Petitioner's Petition for Writ of Certiorari, Respondent's Brief admits the very argument Petitioner has propounded to the Court.

Respondent, citing Moyer v. ATF, 830 F.Supp. 516, 518 (W.D. Mo. 1993), argues (Resp. 7) that the "ATF is statutorily forbidden from taking any action at all on Section 925(c) applications; it may neither grant nor deny them." The inability of the ATF to take any action at all is precisely the reason why the district court should have jurisdiction to rule if the individual should have his Federal firearms disabilities removed. In most cases, the exhaustion doctrine prevents judicial review unless the plaintiff has exhausted all of his administrative remedies. However, the exhaustion doctrine may be bypassed if the individual's fact situation satisfies any of the exceptions to the exhaustion doctrine. These exceptions are set out in Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1094 (5th Cir. 1989) and Hessbrook v. Lennon, 777 F.2d 999, 1003 (5th Cir. 1986) and are as follows:

1. It would be patently futile to use the due process procedures;

2. An agency has adopted a policy or pursued a practice of general applicability that is contrary to the law;

3. It is improbable that adequate relief can be

obtained by pursuing administrative remedies (e.g. the hearing officer lacks the authority to grant the relief sought); or

4. Where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought.

The existence of these exceptions to the exhaustion doctrine are further evidenced by the case of Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In Honig, the Court emphasized that judicial review is normally not available until all administrative proceedings are completed; however, the exhaustion doctrine may be bypassed where exhaustion will be futile or inadequate. Honig 484 U.S. at 326, 108 S.Ct. at 606.

Petitioner's situation is similar to the situation in the case of Manecke v. School Board of Pinilias County, 762 F.2d 912, 918 (11th Cir. 1985), cert. denied, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed. 2d 784 (1986) in which the school board denied plaintiff access to the EHA's "carefully tailored administrative and judicial mechanism." The Court ruled in these circumstances, exhaustion of administrative remedies is not required before the district court may take action. Christopher W., 877 F.2d at 1095. Furthermore, in Kerr Center Parents Ass'n v. Charles, 897 F.2d 1463 (9th Cir. 1990), the Court ruled failure to exhaust administrative remedies was not a bar to the actions because resort to the administrative process would have been futile. In Kerr, parents of handicapped children instituted a Federal suit against the school district and individual administrators. The school district had refused to provide a due process hearing and stated they would no longer provide educational services because the

state had not appropriated sufficient funds. The Ninth Circuit held the plaintiffs were not required to exhaust their administrative remedies because they had already taken all the measures to secure administrative relief which could reasonably be expected of them, and the state had determined it would not provide the funds necessary for plaintiffs' free appropriate education. Id. at 1470. These cases clearly indicate the district court has jurisdiction in cases where the administrative agency will not abide by the guidelines for reinstatement of an individual's firearms rights. Due to the ATF's inability to process Petitioner's Application for Removal of Federal Firearms Disabilities (hereinafter referred to as "Petitioner's Application"), the ATF is denying Mr. McGill access to the administrative mechanism. Both the Fifth Circuit and the Supreme Court have held the exhaustion doctrine does not apply in cases where it would be futile to use the due process procedure or when the due process procedure has been denied. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606. In these instances, the district court may take action.

It is clear from Respondent's Brief that the ATF is statutorily forbidden from taking any action on Petitioner's Application; and therefore, the ATF no longer has the authority to make a ruling on Petitioner's Application. By arguing that the ATF cannot take action, Respondent admits that the district court should have jurisdiction to rule on Petitioner's Application for the following reasons:

1. It would be patently futile for Petitioner to continue pursuing his administrative remedies because the ATF will not review his application; and

2. It is improbable that adequate relief can be obtained by pursuing administrative remedies because the hearing officer lacks the authority to grant the relief sought.

Both of the above arguments are exceptions to the exhaustion doctrine. Christopher W., 877 F.2d at 1094, Hessbrook 777 F.2d at 1003, Honig 484 U.S. at 326, 108 S.Ct. at 606.

Respondent contends (Resp. 7) that "Even if ATF's refusal to process petitioner's application were treated as a denial, it would not assist petitioner." However, Petitioner is not arguing that the ATF has denied Petitioner's Application. Instead, Petitioner is arguing that it would be patently futile for Petitioner to continue to apply to the ATF to have his Federal firearms disabilities removed because the ATF lacks the authority to grant the relief, and therefore, it is improbable that adequate relief can be obtained by further pursuing Petitioner's administrative remedies.

Respondent further contends (Resp. 10) that since this issue is pending in a number of other cases across the country, this case and the Rice v. United States, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971) opinion does not warrant this Court's review. However, the fact that other cases are pending on this issue is the very reason that this Court should review this case and the Rice case. By doing so, this Court can make a clear and decisive ruling on whether the district court has jurisdiction to rule on an individual's application for removal of Federal firearms disabilities.

Respondent also states (Resp. 10-11) that it believes the other appellate courts will agree with the Fifth Circuit's decision in this case and that a consensus in the court of appeals may emerge. But, the other appellate courts may just as well agree with the Third Circuit's decision in the Rice case. No matter how the other appellate courts rule, there will still exist a conflict in the circuits. And although a consensus may emerge, a clear and decisive ruling by the Supreme Court will be the quickest and most effective method to resolve any conflicts between the circuit courts.

Moreover, Respondent states (Resp. 11) that "the decision in the Rice case has not had significant consequences thus far." This argument only shows the Court that any fear of an onslaught of cases being filed with the district courts by individual's seeking to have their Federal firearms disabilities removed is completely unfounded.

As stated before, this case presents an excellent opportunity for this Court to make a clear, decisive and final determination of whether Public Law 102-393 makes an individual's application to the Bureau of Alcohol, Tobacco and Firearms futile since the ATF no longer has the authority to rule on an individual's application to remove Federal firearms disabilities such that the individual is no longer under the exhaustion of administrative remedies doctrine and may seek relief directly in the district court.

CONCLUSION

For the foregoing reasons, Petitioner, Kenneth W. McGill, respectfully requests this Court to grant his

petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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